SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 244

LEONA ANDERSON MAY,

Appellant,

vs.

OWEN ANDERSON

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

RALPH ATKINSON,
F. W. SPRINGER,
Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 244

LEONA ANDERSON MAY,

Appellant

vs.

OWEN ANDERSON,

Appellee

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

This brief is filed because, where an appellee files a motion to dismiss or affirm as appellee Anderson has done here, paragraph 3 of Rule 12 seems to require the appellant, if he opposes the motion, to indicate his opposition by filing an opposing brief.

As is perhaps evident without this brief, appellee Anderson's combined motion and contra jurisdictional statement, instead of refuting the contention of the appellant, Mrs. May, that the Supreme Court of the United States has appellate jurisdiction of this case and that the case involves questions proper for the Supreme Court to decide, tends to support her contention:

I

Said combined motion and statement concedes that all technical jurisdictional requirements imposed by 28 U. S. C. § 1257 (2) are satisfied by addressing itself solely to a claim that the federal questions the case presents are not substantial.

II

In arguing that the questions are insubstantial, moreover, appellee Anderson makes no effort to meet the fact that this case presents two federal questions which, in *New York ex rel. Halvey* v. *Halvey* (1947), 330 U. S. 610, 615, 91 L. Ed. 1133, 1136, 67 S. Ct. 903, 906, the Supreme Court of the United States expressly raised and on which it then expressly reserved decision.

And appellee Anderson does not deny that those questions are questions that arise daily throughout the United States in the lives of the public, or that they are of such character that the answers given them determine more often than not the entire future of the people whose lives they touch. He does not try to deny that the answers the courts below have in this case given said questions will, if those answers are permitted to stand, consistently lead hereafter to gross injustice. (The Court of Appeals' opinion in this case was on July 7, 1952 published in 63 *Ohio Law Abstract* 324. Publication in the National Reporter System, 106 or 107 N. E. 2d, will therefore shortly follow.)

Thus appellee Anderson does not deny that this case presents questions of an importance that fully justified the Supreme Court's reservation of them in the *Halvey* case, above. Nor does he deny that they are questions the Supreme Court has never determined.

Instead, he contends that the federal questions here are not substantial because, so he asserts, the courts below have

decided them "correctly." Two answers to this are obvious:

First, the contention assumes that the Supreme Court of the United States will not, to settle an important question, admit a case and then affirm the court below. The reports are replete with cases that demonstrate the contrary.

Second, appellee Anderson's assertion that the courts below have decided the federal questions in this case correctly, *an assertion unsupported by the citation of a single authority*, flies in the face of what, as we show on pages 28 to 30 of the jurisdictional statement, is today the unanimous holding of all State courts of last resort who are known to have had before them the first of the two main questions in this case, namely: Do the bare domicil and consequent citizenship in a State of a United States citizen no longer present in the State, give the courts of that State jurisdiction, without notice to him, to adjudicate him to be a minor or incompetent and make an order purporting to commit him to custody?

Said assertion flies in the face, further, of the view seemingly expressed on that question by at least two members of the Supreme Court in their concurring opinions in the *Halvey* case, *supra* (330 U. S. 616, 91 L. Ed. 1137, 67 S. Ct. 907).

Turning to the questions connected with *Ohio General Code* § 7996, which reads:

> "§ 7996. The husband is the head of the family. He may choose any reasonable place or mode of living, and the wife must conform thereto",

they arise, as we have seen, because the courts below have so construed and applied § 7996 as to deprive Mrs. May of the legal power to shift her children's domicil and consequent State citizenship, and perhaps also her own, into Ohio.

Appellee Anderson ignores the questions whether, as thus construed and applied, § 7996 constitutes State interference with a subject matter which the first sentence of the 14th Amendment has made one of exclusively federal cognizance, and whether it takes from Mrs. May a "privilege or immunity" given her by that sentence.

He argues, however, that the construction given § 7996 by the courts below applies only to cases where there has been no permanent separation of the husband and wife, that this application is reasonable, and therefore that it is at least not violative of the "due process" and "equal protection" clauses of the 14th Amendment. He says:

> "If the defendant [wife] were * * * *permanently* separated from the plaintiff [husband] at the time that the divorce action was commenced, and if *she* had the children at the time of such separation * * *, she could then have established the domicile of the children at such place that her place of abode was established."

This is astonishing argument. It is stipulated in this case, and the evidence shows the stipulation to be one of incontestable fact, that Mrs. May *was* "permanently separated" from appellee Anderson on or before January 1, 1947 (*i. e.*, at least six days before he commenced his Wisconsin divorce action on January 6, 1947), that she was then in Ohio and had the children in Ohio with her, and that, by January 1, 1947, Ohio *had* become her "place of abode" and has remained such ever since.

Thus the precise thing the courts below have held is that Ohio General Code § 7996 *does* strip a wife who is "permanently separated" from her husband of the legal power to move her children's domicil and resulting State citizenship, and perhaps also her own, *into* Ohio—that § 7996 erects an invisible barricade at the Ohio state line.

WHEREFORE: We urge that appellee Anderson has failed to show anything making against the jurisdiction of the Supreme Court of the United States and that, for the several reasons urged in appellant's jurisdictional statement, the Federal questions involved are important and substantial and the Supreme Court does have jurisdiction of this case.

Respectfully submitted,

RALPH ATKINSON,
F. W. SPRINGER,
Attorneys for Appellant.

(3182)